Risky Business? Issues in Licensing Copies of Archival Holdings

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RÉSUMÉ Cette étude examine les politiques et pratiques des archives nationales, provinciales et territoriales canadiennes par rapport à la création de copies pour les utilisateurs. Dans plusieurs cas, ces centres d'archives tentent de contrôler d'autres utilisations du matériel en prétextant le droit d'auteur, même s'ils ne sont parfois pas les détenteurs du droit d'auteur, et/ou des questions autres que le droit d'auteur peuvent entrer en jeu. En faisant référence à l'information disponible sur leurs sites web, cette étude examine l'établissement du droit d'auteur et les conditions que l'on impose sur les copies pour les utilisateurs. Cette étude révèle une grande étendue de pratiques entre les institutions et des inconsistances de pratiques au sein d'une seule institution. Du point de vue légal, certaines pratiques sont quelque peu problématiques, quoi qu'elles ne constituent pas un risque légal majeur. Plus important encore, en semant la confusion auprès des utilisateurs et en restreignant l'accès et l'utilisation de façon inappropriée, certains centres d'archives mettent à risque leur mission de base de rendre leurs collections disponibles. Les politiques et pratiques de ces institutions par rapport à la création de copies pour les utilisateurs ont besoin d'être revues afin d'assurer qu'elles sont complètes, consistantes et à jour.

ABSTRACT This study investigates the policies and practices of Canada's national, provincial, and territorial archives when they are making copies for users. In many cases, these repositories attempt to control further uses under the rubric of copyright, even though they may not be the rights holders and/or interests other than copyright may be at issue. Referencing the data available on their websites, the study looks at copyright ownership and the conditions imposed on copies for users. The study reveals a wide range of practices across institutions and internal inconsistencies within a single repository's practice. From a legal perspective, certain practices are somewhat problematic, although they may not pose a great legal risk. More significantly, by confusing users and inappropriately restricting access and use, some archives are compromising their core mission to make their holdings available. These institutions' policies and practices for making copies for users need review to ensure that they are comprehensive, internally consistent, and up to date.

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Introduction

Archival institutions acquire, preserve, and make available for use records of enduring value. The materials preserved in archival repositories are "the information by-products of organizational or social activity."[1] Such materials were created and accumulated naturally by an organization, a person, or a family in the conduct of their affairs and preserved because of the enduring value of the information they contain or as evidence of the functions of their creator.[2] Archival holdings are not, for the most part, created for commercial purposes or dissemination to the public and thus are largely unpublished. Their unpublished nature means that archival holdings are largely unique and irreplaceable. As a result, archival records do not leave the institution that preserves them. Those wishing to consult archival materials had to visit the archives and take notes or obtain copies of the items relevant to their research. Responses to inquiries from remote users often include copies of items from the holdings. Consequently, archivists have well-established policies and procedures for making copies for their users. Many repositories subject the provision of copies to certain terms and conditions to which users must agree, even if the archives does not own the copyright or the copyright has expired. These policies have been characterized as "a kind of quasi-copyright-like control over the further use of materials in their holdings."[3]

The Internet provides exciting possibilities to increase access to archival holdings, and archival repositories have embraced these opportunities by digitizing their holdings and making them available online. Ever-increasing amounts of archival material can be consulted without having to visit a repository or interact with an archivist. However, the ease with which digital documents can be copied and disseminated without consulting the repository has only exacerbated archivists' concerns about what users might do with the copies of the repository's holdings. To address these concerns in the digital environment, in many cases institutions limit the quality of online images using various technical measures – for example, posting them in low resolution, with visible watermarks, or as thumbnails[4] – so that images copied from the website will be suitable only for research or private study and, in

1 Judith Ellis, ed., *Keeping Archives*, 2nd ed. (Port Melbourne, AU: Thorpe, 1993), 477.
2 Richard Pearce-Moses, *A Glossary of Archival & Records Terminology* (Chicago: Society of American Archivists, 2005), 30.
3 Peter B. Hirtle, "Archives or Assets?" *American Archivist* 66, no. 2 (Fall/Winter 2003): 240.
4 For more detailed information regarding the technical measures adopted to control further uses of online content, see Jean Dryden, "Copyfraud or Legitimate Concerns? Controlling Further Uses of Online Archival Holdings," *American Archivist* 74, no. 2 (Fall/Winter 2011): 530–32; and Jean Dryden, "Just Let It Go? Controlling Reuse of Online Holdings," *Archivaria* 77 (Spring 2014): 53–55.

many cases, publication-quality copies must be ordered from the repositories. Regardless of the quality of the online or supplied images, repositories continue to attempt to control downstream uses through the terms and conditions of use available on their websites.

For several reasons, archives' attempts to control further uses may be problematic if the archives is not the rights holder or if institutional practices are not consistent with copyright law. Controlling downstream uses when you are not the rights holder is not so much a matter of infringing copyright as it is a matter of compromising an archives' core mission to make its holdings available. Archives are preserved to be used, and one of the core values of archivists is to "promote and provide the widest possible accessibility of materials."[5] Authorizing certain uses and denying others when you have no right to do so may inappropriately restrict access and use. Such practices may also be confusing to users, as are inconsistent practices across institutions. Knowledge of the laws that affect the creation and use of records (including copyright) is an essential component of archival graduate education. If practices communicate different messages to users, that also undermines the archival mission.

This article embarks upon a line of research suggested in my dissertation, i.e., to explore the copyright practices of particular types of repositories.[6] It examines the reproduction policies and procedures of Canada's national, provincial, and territorial archives in order to identify the copyright issues at play when these institutions provide their users with copies of items from their holdings.[7] The investigation focuses on two areas: the extent to which these repositories own copyright in their holdings and the extent of their compliance with copyright law when making copies for users. Where there are gaps between the law and practice, the article then looks at the risks of such practices.

Government archives were chosen because they share common characteristics: they are publicly funded; they collect not just the records of their respective governments but also records from the private sector; and their holdings consist of all media (textual records, photos, maps, plans, sound recordings, and moving images). After the first instance, the institutions are referred to throughout the article using the abbreviations (e.g., LAC, BCA) or short forms (e.g., The Rooms) of their names as set out in the appendix.

5 Society of American Archivists, "Core Values of Archivists: Access and Use" (2011), http://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics. [This and all online sources below accessed 31 August 2016.]

6 Jean Dryden, "Copyright in the Real World: Making Archival Material Available on the Internet" (PhD diss., University of Toronto, 2008), 251.

7 Repository policies pertaining to copies made by users on self-serve copiers or with their phones or cameras are outside the scope of this article.

The data were gathered in January 2016 from the websites of the institutions in question.[8] Only data available on the websites were examined. Data collection presented a challenge in that information about institutional practices is rarely found in a single location; instead, it requires a search of various places, including reproduction order forms, requests for permission forms, guidelines, formal policy documents, published pamphlets or handouts, and/or a page about copyright information. Although every effort was made to locate all tidbits of copyright information, one cannot guarantee that everything was found, given the diverse content and sometimes complex navigational structure of the websites. This exploratory initial study was limited to the copyright information available on the institutions' websites, but it would be useful to extend this research and contact the institutions (through interviews or questionnaires) to explore the reasons for inconsistencies and ambiguities in their policies as well as any gaps between stated policies and actual practice.

Ownership of Copyright

The first question to be examined is the extent to which an archives owns the copyright in the works in its holdings. Copyright is very complex, and most archives' holdings include much material for which the ownership and copyright status is uncertain. The tasks of identifying and locating copyright owners present significant difficulties. If, on the other hand, the archives is the copyright owner, or is authorized to administer copyright on behalf of rights holders, the basis and scope of its authority to make and distribute copies is clear.

Acquisition Practices

Archival repositories acquire their holdings in several different ways: transfer from the archives' parent body (in this case, the federal, provincial, or territorial governments); donations/gifts from entities outside the government; or (rarely) purchase.[9] In Canada, the national, provincial, and territorial archives have a statutory mandate to document the history of their respective jurisdictions by acquiring not only the records of their respective governments, but also material from private-sector individuals, and non-government organizations.

8 Information is available for Library and Archives Canada, the 10 provincial archives, and the archives of the Yukon and Northwest Territories. The Nunavut Archives website (http://www.ch.gov.nu.ca/en/Archive.aspx) contains no information about the Archives reproduction or private-sector acquisition policies.

9 Laura A. Millar, *Archives Principles and Practices* (New York: Neal-Schuman, 2010), 131–38.

The acquisition process generally conveys ownership of the physical property to the repository; however, the repository does not necessarily own the copyright in those items.[10] If a repository preserves the records of its parent body, the parent body owns the copyright in the records created by its employees,[11] and the repository will probably be authorized to administer the copyright in those holdings on behalf of the parent body. However, the repository will not own the moral rights in such works unless the employees have waived their moral rights as a condition of employment.[12] Nor will the repository own the copyright in works created outside the organization, e.g., correspondence received, or works created by contractors or consultants (unless there is an agreement that assigns the contractor's copyright to the organization). The claim made by the Bibliothèque et Archives nationales du Québec (BAnQ) that "BAnQ détient les droits d'auteur sur la majorité de ses fonds d'archives" is overstated in relation to the thousands of individual works within these archival holdings.[13]

In the case of acquisitions from non-government entities, repositories increasingly attempt to obtain an assignment of all copyright interests from the donor (or vendor) when documents are deposited in the archives.[14] Detailed information about the private-sector acquisition practices of Canada's government archives is not available online, but of the repositories in question, the British Columbia Archives (BCA), the Archives of Manitoba (AM), and the Northwest Territories Archives (NWTA) "encourage" an assignment of copyright;[15] BAnQ asks that donors grant a licence for the material in which they own the copyright so as to permit the archives to carry out its mission;[16] the Provincial Archives of Alberta (PAA), the Provincial Archives

10 Ibid., 133–35.

11 Unless there is an agreement to the contrary. See *Copyright Act*, R.S.C. 1985, c. C-42, s. 13(3).

12 Moral rights refer to the right of integrity of the work (i.e., to prevent changes to the work that are prejudicial to the author) and the right of attribution. Moral rights belong to the author and they cannot be assigned; they can only be waived (*Copyright Act*, ss. 14.1 and 28.1).

13 Bibliothèque et Archives nationales du Québec [hereafter BAnQ], "Droit d'auteur et intégrité de l'information," http://www.banq.qc.ca/outils/droit_auteur_avis_integrite/index.html.

14 The common archival practice of obtaining an assignment of copyright as part of the acquisition of the physical property is documented in Jean Dryden, "Copyright Issues in the Selection of Archival Material for Internet Access," *Archival Science* 8, no. 2 (2009): 137–38; and Jean Dryden, "The Role of Copyright in Selection for Digitization," *American Archivist* 77, no. 1 (Spring/Summer 2014): 75–76.

15 See British Columbia Archives [hereafter BCA], "Donating Private Records to the BC Archives," 2, http://royalbcmuseum.bc.ca/assets/DonatePrivateRecords.pdf; Archives of Manitoba [hereafter AM], "What Do I Need to Consider before Making a Donation?" http://www.gov.mb.ca/chc/archives/donate/consider.html; Northwest Territories Archives [hereafter NWTA], "Donating Records," http://www.nwtarchives.ca/donors.asp.

16 BAnQ, "Processus d'acquisition des archives privées," 4–5, http://www.banq.qc.ca/dotAsset/fa259889-3cc7-4edf-8f4b-6b3fabbe7aef.pdf?language_id=3.

of Saskatchewan (PAS), and the Archives of Ontario (AO) discuss copyright ownership as part of the acquisition process or address it in the donation agreement;[17] and the remainder of the archives studied provide no information about their private-sector acquisition processes.

If the donor is also the copyright owner, the archives will thus own the copyright in the newly acquired material. However, if the donor does not own the copyright in the works being deposited, as is commonly the case when, for example, the donor is depositing correspondence received *from* many different people, the donor cannot authorize any assignment of copyright in these items because the donor does not own the copyright in works created by others. Therefore, the acquisition agreement typically includes a caveat similar to the following examples. The copyright manual produced by the National Archives (as it was then called), which was made available to the wider Canadian archival community, contained model deed of gift agreements that included the following clause: "The Donor hereby gives and transfers unto the Archives the full and unencumbered title to the Donation and assigns unto the Archives the copyright of the material *for which he is the owner* in the Donation [emphasis added]."[18] In cases when a donor was unwilling to assign copyright to the institution, the model deed of gift included a licence to permit the Archives to do certain things; for example, "the Donor hereby grants to the Archives the right to exhibit, reproduce or publish for Archival purposes, without payment of royalties, any item of the donation *in which the Donor owns copyright* [emphasis added]."[19]

Repositories could also, in the course of the acquisition process, attempt to obtain a waiver of moral rights in the works being deposited.[20] However, the donor can waive moral rights only in those documents he or she authored. None of the archives studied mentions a waiver of moral rights as part of its acquisition processes.

Validity of Assignments

Archives clearly recognize that donors typically do not own the copyright in all the works they deposit in an archives, but the copyright assignments or licences in acquisition agreements may give repositories a false sense of confidence

17 Provincial Archives of Alberta [hereafter PAA], "Donate Your Records," http://culture.alberta.ca/paa/donating.aspx; Provincial Archives of Saskatchewan [hereafter PAS], "The Donation Process," http://www.saskarchives.com/donating-records/donation-process; Archives of Ontario [hereafter AO], "What Is a Donation Agreement?" http://www.archives.gov.on.ca/en/donating/donating_to_archives.aspx.

18 Wanda Noel, *Staff Guide to Copyright* (Ottawa, ON: National Archives of Canada, 1999), 134.

19 Ibid., 138, 140.

20 See examples of wording of moral rights waivers in Noel, *Staff Guide to Copyright*, 136, 140.

about the extent of their copyright ownership. The varied nature and voluminous extent of many archival collections mean that determining whether the repository owns the copyright in any particular work can be a challenge. The donation agreements are at the collection level, but the provisions of copyright law apply to the item level of individual works, and archivists lack the time and expertise to verify the information provided by the donor, or to investigate the copyright status and ownership of each item in a collection that may consist of tens of thousands of records in a variety of media. For example, former prime minister Brian Mulroney's papers currently consist of 721 linear metres of textual records, 869 megabytes of "born-digital" records, 2,342 videocassettes, 2,991 audiocassettes, and photos.[21] Sorting out the copyright ownership in this vast fonds is a daunting prospect. Furthermore, donors themselves may have only a hazy understanding of what copyrights they own, and their assignments may be worthless.

The chain of title of the intellectual property is often not known, as illustrated by the following situations. The archives may not be aware of prior agreements that assigned copyright elsewhere. Documentation of the copyright arrangements with contractors rarely accompanies the records, so ownership of works created by contractors or consultants is not clear. The historical photos of a newspaper are a treasure trove, but without the supporting documentation, it is difficult to know for sure what was taken by a staff photographer, what was submitted by a freelancer, and what the arrangements were with the latter. In the case of the records of professional photographers, the archives acquires the negatives or prints, but the business records rarely accompany the images. Until the *Copyright Act* was amended in 2012, copyright in commissioned photos was owned by the commissioner (in the absence of an agreement to the contrary),[22] but the business practice of any particular photographer in this regard may not always be known (especially if he or she is no longer alive and the family is disposing of the records).

Reversionary Rule

Even when the donor's copyright assignment is valid, the reversionary rule may pose a further problem. Section 14(1) of the Act provides that the ownership of copyright in a work (in certain circumstances) reverts to the author's estate for the last 25 years of copyright protection. Where the author is the first owner of the copyright in a work (that is, the work is neither a Crown work, nor one created in the course of employment, nor a commissioned photo, engraving, or portrait created before 7 November 2012) and the author assigned his or

21 See the description of the Brian Mulroney Fonds at http://collectionscanada.gc.ca/lac-bac/search/arch.

22 *Copyright Act*, s. 13(2) as repealed by *Copyright Modernization Act*, SC 2012, c. 20, s. 7.

her copyright to another party (such as an archives) by contractual agreement (other than a bequest), the contract becomes void 25 years after the author's death, and the copyright reverts to the author's estate for the remaining 25 years of protection. However, it is not clear whether either archives or rights holders are aware of this provision. And even if they are aware of the law, they might not know of the existence of an earlier assignment.

The foregoing discussion sets the stage for the examination of attempts by these repositories to control downstream uses of copies of their holdings. Determining copyright ownership in any particular work is clearly a complex matter, often requiring extensive research that strains scarce staff resources. However, an examination of the copyright issues involved in deciding what to make available online is beyond the scope of this article.[23] The foregoing discussion simply makes the point that these repositories' belief that they own copyright in certain holdings may not be well founded.

Making Copies for Users

However, uncertainty over copyright ownership has not stopped archives from making copies for users, nor should it. While the right to reproduce a work or a sound recording is one of the exclusive rights of the copyright owner,[24] the Act includes exceptions that permit archives to make copies for users. However, the manner in which these repositories implement these exceptions varies greatly across institutions, and some institutions go well beyond what copyright law entitles them to do. Within a single institution, practice is not always clear or internally consistent. This section discusses the statutory basis for reproduction and the gaps between the law and practice.

Statutory Basis for Reproduction

When it comes to making copies for their users, all the repositories studied (except the Provincial Archives of New Brunswick [PANB] and NWTA) state somewhere on their site that the making of copies is subject to the *Copyright Act* (or copyright law),[25] although only the Nova Scotia Archives (NSA) refers to specific provisions of the exceptions for libraries, archives, and museums (LAMs).[26] Two provisions in the statute – fair dealing and the exceptions for LAMs – permit archives to make copies for their users. The fair dealing

23 For a detailed discussion of the relationship between copyright and selection, see Dryden, "Copyright Issues," 123–47; and "The Role of Copyright," 64–95.

24 *Copyright Act*, ss. 3(1), 18(1)(b).

25 NWTA's copyright page does not mention the law; see NWTA, "Copyright and Usage Notice," http://www.nwtarchives.ca/copyright.asp.

26 Nova Scotia Archives [hereafter NSA], "Copyright Policy" (December 2000), s. 4.1, https://archives.novascotia.ca/sites/default/files/inline/documents/copyright.pdf.

provision, which has been in the Act since 1921, provides that it is not an infringement to deal fairly with a work for the purposes of research, private study, education, parody, or satire (section 29); criticism or review (s. 29.1); or news reporting (s. 29.2). Fair dealing is a very flexible provision in that it applies to all categories of protected matter, is not limited to any particular activity, user group, or technology, and is not subject to any conditions except the requirement to cite the source when using a work for criticism or review. Presumably archives have always been making copies for users' research or private study under s. 29, whether they knew it or not. However, only five repositories – BCA, AO, NSA, Provincial Archives of Newfoundland and Labrador (The Rooms), and PAS (the latter only in relation to users copying documents using their own cameras) – explicitly mention fair dealing.[27] AO, NSA, and The Rooms appear to misunderstand fair dealing, stating (The Rooms) or suggesting (AO and NSA) that it applies only to making copies of *published* materials, with NSA maintaining furthermore that the Act permits 10 percent of a work to be copied under fair dealing. There is no indication that these repositories are aware of the landmark decisions of the Supreme Court of Canada regarding the power of fair dealing as a user's right.[28]

In 1997, the Act was amended to add exceptions for not-for-profit LAMs.[29] Of particular interest are sections 30.2(1) and 30.21. While s. 30.2 is mainly about copying of periodical articles, s. 30.2(1) extends the fair dealing provisions in ss. 29 and 29.1 to employees of LAMs and permits them to do anything on behalf of a user that the user may do personally under ss. 29 and 29.1 for the purposes of research, private study, education, parody, satire, criticism, or review.

Section 30.21 permits an archives to make a single copy of an unpublished work in its holdings for a user for the purposes of research or private study, subject to the following conditions: the archive must inform the donor that the material being deposited may be copied for users; the copies can be made as

27 BCA, "Archives Policies: Copyright," http://royalbcmuseum.bc.ca/bc-archives/visitor-information/archives-policies; AO, "Copyright and Your Research" (October 2015), 1, http://www.archives.gov.on.ca/en/access/documents/customer_service_guide_108_copyright.pdf; NSA, "Copyright Policy," s. 4.1.2 and glossary; NSA, "Copying and Use Protocols for Archival and Library Holdings," http://archives.novascotia.ca/copying-and-use-protocols-archival-and-library-holdings; The Rooms, "Copying Request," https://www.therooms.ca/sites/default/files/pdf/copying_request.pdf; PAS, "Digital Reproductions," http://www.saskarchives.com/using-archives/visiting-archives/reading-room-services-and-procedures/ordering-reproductions/digital.

28 *CCH v Law Society of Upper Canada*, 2004 SCC 13; *Alberta (Education) v Access Copyright*, 2012 SCC 37; and *SOCAN v Bell*, 2012 SCC 36.

29 *Copyright Act*, ss. 30.1 (copying for preservation purposes), 30.2 (copying periodical articles), 30.21 (copying unpublished works in an archives' holdings), and 30.3 (repositories are not liable for infringing copies made on self-serve copying machines they provide). All are subject to conditions.

long as the copying has not been prohibited by the donor (if a rights holder) or by any other rights holder; and the user for whom the copy is made must be informed that the copy is for research and private study only and any other uses may require the permission of the rights holder.[30]

Although only NSA refers explicitly to s. 30.21,[31] other repositories seem to be aware of at least some of the conditions associated with that section. Library and Archives Canada (LAC), PAA, PAS, AO, NSA, Prince Edward Island Public Archives and Records Office (PARO), and The Rooms state that copies will be made for the purpose of research or private study.[32] Yukon Archives (YA) does not specify a purpose for copies made in its policy statements, although its reproduction order form requires users to indicate whether the copies will be used for "research or private study," a "non-commercial project," or a "commercial project."[33] AM generalizes by stating that copies can be used for "what is permissible under the Canadian Copyright Act"; however, its reproduction order forms require users to indicate whether the copies will be used for "research or private study" or uses beyond that.[34] BAnQ makes copies for "des fins éducatives, d'étude privée ou de recherche," although education is an approved purpose under fair dealing, but not under s. 30.21.[35] Two institutions focus on the research aspect: NWTA makes copies for "personal research";[36] and BCA distinguishes between research use – defined

30 See *Copyright Act*, s. 30.21(3.1)(b) and *Exceptions for Educational Institutions, Libraries, Archives and Museums Regulations*, SOR/99-325, ss. 6 & 7.

31 NSA, "Copyright Policy," ss. 4.1.3–4.1.4.

32 LAC, "Copyright Restrictions," http://www.bac-lac.gc.ca/eng/services-public/access-documents/Pages/copyright-restrictions.aspx; PAA, "Provincial Archives of Alberta Operations Manual" (December 2013), 41, http://provincialarchives.alberta.ca/who-we-are/about-us/provincial-archives-of-alberta-operations-manual.aspx; PAS, "Conditions of Service and Use," http://www.saskarchives.com/reproductions-conditions-use-service; AO, "Copyright and Your Research," 1; NSA, "Copying and Use Protocols"; Prince Edward Island Public Archives and Records Office [hereafter PARO], "Copying of Archival Materials: Acceptable Image Use and Conditions," accessed 6 June 2016 at Internet Archive Wayback Machine, https://web.archive.org/web/20160606035047/http://www.gov.pe.ca/archives/index.php3?number=1005953&lang=E (PARO has reconfigured its website since this study was done; only some of the web pages cited are accessible via the Wayback Machine); The Rooms, "Copying Request," https://www.therooms.ca/sites/default/files/pdf/copying_request.pdf.

33 Yukon Archives [hereafter YA], "Public Request for Reproduction of Record(s) Agreement," http://www.tc.gov.yk.ca/pdf/Request_for_Reproduction_Form_Amended_May_2009.pdf.

34 AM, "Terms Governing Use of Copies," http://www.gov.mb.ca/chc/archives/copy_services/pdf/terms_of_use.pdf; "Request for Photocopies, Microfilm Prints and Microfilm Scans," http://www.gov.mb.ca/chc/archives/copy_services/pdf/request_for_photocopies_microfilm.pdf; and "Request for Moving Image and Sound Reproductions," http://www.gov.mb.ca/chc/archives/copy_services/pdf/request_for_mi_reproductions.pdf.

35 BAnQ, "Droit d'auteur et intégrité de l'information."

36 NWTA, "Ordering Copies," http://www.nwtarchives.ca/ordering.asp, and "Copyright and Usage Notice."

as "academic research (K–12 school projects), private study (reference and research), gift or genealogy research" – and non-research use.[37] PANB provides images for "personal, educational, and non-profit purposes."[38] Only PAS, AO, NSA, and The Rooms specify a single copy.[39] Only The Rooms and NSA specify unpublished works.[40]

BCA, AO, AM, and LAC mention donor restrictions but have broadened the statutory condition that prohibits copying when restricted by a donor if the donor is a rights holder: these institutions apply it to *all* copying restrictions by donors, whether or not they are rights holders.[41] This is not surprising, since donors are entitled to restrict copying for reasons other than copyright, and donor agreements represent a contract that an archives must honour. The requirement in s. 30.21(2) to inform donors that the material being deposited may be copied for users is not addressed on any of the websites but may be documented in detailed acquisition procedures not normally available to the public.

The policies of AO and NSA are out of date – they indirectly refer to ss. 30.21(5) and (6), which required an archives to keep records of copies made when the rights holder could not be located.[42] These sections and the related regulations were repealed in 2004 and 2008 respectively.[43] BCA summarizes selected aspects of the 1997 amendments;[44] while the summary is sufficiently general not to be incorrect, the relevant provisions of the Act have been amended several times since then, and a fuller overview of copyright would be helpful for users.

Fees

A related constraint on copies made in accordance with s. 30.21 is that the copies must be provided to the user without a "motive of gain." Section 29.3 of the Act provides that copies made in accordance with s. 30.21 (and certain other exceptions for LAMs and educational institutions) can involve a fee that does no more than recover costs, including overhead costs. However, this

37 BCA, "Request a Quote," http://royalbcmuseum.bc.ca/repro-request.

38 Provincial Archives of New Brunswick [hereafter PANB], "Image Use Policy," http://archives.gnb.ca/ImagePolicy.aspx?culture=en-CA.

39 PAS, "Conditions of Service and Use"; AO, "Copyright and Your Research," 1; NSA, "Copying and Use Protocols"; The Rooms, "Copying Request."

40 The Rooms, "Copying Request"; NSA, "Copyright Policy," s. 4.1.3.

41 BCA, "Archives Policies: Donor Restrictions," http://royalbcmuseum.bc.ca/archives-visitors/policies; AM, "Terms Governing Use of Copies"; AO, "Copyright and Your Research," 1; LAC, "Copyright Restrictions."

42 AO, "Copyright and Your Research," 2; NSA, "Copyright Policy," s. 4.5.

43 SC 2004, c. 11, s. 21(3). Section 5 of the *Exceptions for Educational Institutions, Libraries, Archives and Museums Regulations* was repealed in 2008 (SOR/2008-169, s. 5).

44 BCA, "Archives Policies: Copyright."

constraint does not apply to copies made under the fair dealing provisions. All repositories charge fees to cover the cost of time and materials to make copies and send them to the user. Fees vary depending on the copying technology required; for example, the cost of duplicating a film is clearly far greater than making photocopies.

Only four institutions (BCA, PAA, PAS, and NSA) charge an additional "use" fee for non-research uses such as publication, broadcast, and merchandise (mugs, T-shirts, etc.). The BCA and PAS set out their use fee schedules;[45] NSA indicates only that "fees are applied to certain categories of publication or use," and the fee is determined once a "Publication and Use Request Form" has been submitted.[46] PAA's operations manual indicates that usage fees are charged for publication or commercial use and refers users to the fee schedule.[47] However, instead of being tied to particular uses, PAA's usage fee is included in the price of copies of photos, which varies depending on size and resolution.[48] YA is the only institution that provides a detailed discussion of its commercial use policy and its reasons not to charge a use fee.[49] That so few charge a use fee is not surprising given that all institutions in the study are publicly funded. However, some institutions are under pressure from their parent bodies to generate revenue in whatever ways they can. An additional publication/use fee allows the archives to generate revenue and to benefit from commercial uses of archives holdings. Only PAS makes it clear that its commercial use fees are unrelated to copyright.[50]

Whether the fees these repositories charge represent a "motive of gain" is not addressed, and the information necessary to calculate "overhead costs" is not available. The amounts of the publication/use fees and the basis for calculating such fees vary widely across repositories. For example, PAS charges $25 per item for commercial publication of any type; BCA's commercial publication fees start at $50 per image and increase depending on size of the print run and whether the image is used inside or on the cover. The cost (which includes both reproduction fee and usage fee) of a publication-quality image (300 dpi) from PAA starts at $31.50 for a 5- x 7-inch image and increases to $73.50 for a 20- x 24-inch one. BCA's broadcast licensing fees are $150 per sound record-

45 BCA, "Reproductions: Licensing," http://royalbcmuseum.bc.ca/archives-visitors/reproductions; PAS, "Conditions of Service and Use."

46 NSA, "Publication and Use of Copies," http://archives.novascotia.ca/share-use-buy-images.

47 PAA, "Operations Manual," 41; "Provincial Archives of Alberta Price List" (26 October 2015), http://culture.alberta.ca/paa/about/policies/docs/ProvincialArchivesofAlbertaPriceList.pdf.

48 PAA, "Photographs," https://atms.alberta.ca/paa/Store/Default.aspx?tagid=28.

49 YA, "Yukon Archives Commercial Use of Archival Records Policy" (May 2009), 3, http://www.tc.gov.yk.ca/pdf/Yukon_Archives_Commercial_Use_of_Archival_Records_Policy.pdf.

50 PAS, "Conditions of Service and Use."

ing item or $250 per film or video. PAS calculates its broadcast use fees on the basis of time: $100 per minute for sound recordings or video.

Terms and Conditions Governing Further Uses

Although it is not clear whether these repositories are making copies for users under s. 30.21 or fair dealing, they often add a number of other conditions that go beyond the statutory limitations on fair dealing or s. 30.21. Nothing in the Act precludes further conditions necessary to achieve the repository's mission, as long as they do not conflict with the Act. For example, all the archives studied require that the source be acknowledged (often specifying a particular format)[51] whenever a copy from their holdings is used,[52] even though s. 30.21 does not require the source to be indicated at all and the fair dealing provisions require that sources be indicated only if used for purposes of criticism, review, or news reporting. They likely do this for a variety of reasons unrelated to copyright: to raise awareness of the repository as the source of the original, to provide contextual information about the collection the item comes from, and to ensure correct captioning and a reference number in order to easily locate the item should another user request it.[53]

In other cases, these archives behave like rights holders in that they attempt to control uses beyond research and private study, even if they are unlikely to own the copyright. Archivists are not particularly concerned about further uses of photocopies, which are not of sufficient quality for purposes other than research and personal use. The desire to control further uses arises when researchers request publication-quality copies (photographic prints, high-resolution digital images) or copies of sound recordings or moving-image material that they wish to disseminate in some way.

51 See, for example, LAC, "How to Cite Archival Sources," http://www.bac-lac.gc.ca/eng/services-public/access-documents/Pages/archival-sources.aspx, and PARO, "Copying of Archival Materials: Acceptable Image Use."

52 LAC, "Copyright Restrictions," http://www.bac-lac.gc.ca/eng/services-public/access-documents/Pages/copyright-restrictions.aspx; BCA, "Permissions Form for Sound Recordings and Moving Image Material," http://royalbcmuseum.bc.ca/assets/Permissions-Form-SMI2.pdf, and "Permissions Form for Still Images, Records and Documents," http://royalbcmuseum.bc.ca/assets/Permissions-Form-Photos-2015.pdf; PAA, "Price List"; PAS, "Conditions of Service and Use"; AM, "Terms Governing Use of Copies"; AO, "Copyright and Your Research," 3; BAnQ, "Droit d'auteur et intégrité de l'information" (the requirement to cite the source is mentioned only regarding content copied from the BAnQ website); PANB, "Services," http://archives.gnb.ca/Archives/About.aspx?culture=en-CA&p=8; NSA, "Publication and Use of Copies"; PARO, "Copying of Archival Materials: Acceptable Image Use"; The Rooms, "Guide to Copyright and Photographs," http://www.therooms.ca/archives/services_forms.asp; YA, "Commercial Use Policy," 4; NWTA, "Ordering Copies."

53 Dryden, "Copyfraud or Legitimate Concerns?," 528–30; Dryden, "Just Let It Go?," 49–52.

Requiring the repository's permission

Most notably, many repositories require the permission of the repository for uses beyond research and private study, even if the repository is not a rights holder. Table 1 sets out the extent to which each repository's permission is required for further uses. Eight institutions require the repository's permission for uses beyond research or private study, or for commercial (i.e., for-profit) uses (or in the case of YA, for all uses). What uses do repositories wish to control by requiring the repository's permission? The range of "controlled" uses varies widely, but generally it involves uses that result in wide dissemination, such as print or electronic publication, exhibits, TV or radio broadcasts, films or videos, websites, and advertisements. Of the eight institutions that require the repository's permission for non-research uses, only BCA explicitly states (and YA implies) that they do not own the copyright in all their holdings,[54] despite the fact that they require the repository's permission for certain non-research uses. On the other hand, all but PAA and PANB state that copyright compliance is the responsibility of the user.[55]

54 BCA, "Archives Policies: Donor Restrictions"; YA, "Request for Reproduction Agreement." BAnQ's statement is ambiguous in that it states in one place "Sauf exception, BAnQ n'est pas titulaire du droit d'auteur sur les œuvres diffusées sur son portail Internet" but elsewhere states "BAnQ détient les droits d'auteur sur la majorité de ses fonds d'archives" (BAnQ, "Droit d'auteur et intégrité de l'information – Responsabilités de l'utilisateur"). LAC and The Rooms, which do not require the repository's permission for non-research uses, also state that they do not own the copyright in all their holdings (LAC, "Copyright Restrictions"; The Rooms, "Guide to Copyright and Photographs," 2).

55 LAC, "Copyright Restrictions"; BCA, "Reproductions: Licensing," "Permissions Form for Sound Recordings and Moving Image Material," and "Permissions Form for Still Images, Records and Documents"; PAS, "Conditions of Service and Use"; AM, "Terms Governing Use of Copies"; AO, "Copyright and Your Research," 3; BAnQ, "Droit d'auteur et intégrité de l'information – Responsabilités de l'utilisateur"; NSA, "Copyright Policy," s. 5.7, and "Publication and Use of Copies"; PARO, "Copying of Archival Materials,", and "Fee Schedule" (latter not available via Wayback Machine); The Rooms, "Copying Request" and "Guide to Copyright and Photographs"; YA, "Request for Reproduction Agreement"; NWTA, "Ordering Copies," and "Copyright," http://www.nwtarchives.ca/copyright.asp. PAA and PANB do not address the issue.

Table 1: Requirements for repository permission for further uses

Archives	Use	Repository's permission required?	Public domain works excluded?	Repository requires evidence of rights holder's permission?
LAC[56]	Other than "research purposes or private study"	No	N/A	Required for rush orders[57]
BCA[58]	"Any use beyond academic research, private study or genealogy research"	Yes	No	Yes (but internally inconsistent)[59]
PAA[60]	Other than "research and private study"	Yes	No	No
PAS[61]	Other than "research or private study"	No	N/A	Yes[62]
AM[63]	"Outside of what is permissible under the Canadian Copyright Act"	No[64]	N/A	No
AO[65]	Other than "research or private study"	Yes	In some cases	No

56 LAC, "Copyright Restrictions."

57 LAC, "Reproduction Requests" (see Price List and Service Standards), http://www.bac-lac.gc.ca/eng/reproduction-requests/Pages/price-list-service-standards.aspx.

58 BCA, "Reproductions: Licensing."

59 Although the website states elsewhere that "under Canadian copyright law, the BC Archives cannot release copies of these records or images without written permission from the copyright holder and/or the donor" ("Archives Policies: Donor Restrictions"), there is no indication in the Terms and Conditions in the permission request forms (http://royalbcmuseum.bc.ca/assets/Permissions-Form-SMI2.pdf and http://royalbcmuseum.bc.ca/assets/Permissions-Form-Photos-2015.pdf) or at "Reproductions: Licensing" that this requirement for proof of third-party permission is followed.

60 PAA, "Audio Visual Reproductions" and "Research Services" order forms (http://culture.alberta.ca/paa/services/docs/HM0001.pdf and http://culture.alberta.ca/paa/services/docs/HM0002.pdf) require users to check off "Research or private study" or "I require permission for publication, public exhibition or commercial use, etc."

61 PAS, "Conditions of Service and Use."

62 Ibid., PAS asks users (after the copies are made) to "file with the Saskatchewan Archives a copy of any ... permissions ... procured from the holders of such ... rights ... in regard to these reproductions or their contents."

63 AM, "Terms Governing Use of Copies." When providing copies of audiovisual materials, AM requires users to sign a release agreement setting out the terms and conditions governing the use of the copies (http://www.gov.mb.ca/chc/archives/copy_services/pdf/guide_mi_reproduction.pdf), but the agreement is not available online.

64 Only if the repository is the rights holder.

65 AO, "Copyright and Your Research," 2.

Archives	Use	Repository's permission required?	Public domain works excluded?	Repository requires evidence of rights holder's permission?
BAnQ[66]	"Toute utilisation autre que celles faites à des fins éducatives, d'étude privée ou de recherche"	Yes	In some cases	Yes (must accompany order form)
PANB[67]	"Images may not appear in materials to be sold for ... profit without permission."	Not clear whose permission is required	N/A	No
NSA[68]	"Publication and use"	Yes	Yes	No
PARO[69]	Other than "research or private study"	Yes	No	Required for digital copies[70]
The Rooms[71]	"Non-research/Commercial use"	Yes[72]	No	No
YA[73]	All uses	Yes	Yes	Yes (must accompany order form)
NWTA[74]	Other than "personal research"	No	N/A	No

66 BAnQ, "Droit d'auteur et intégrité de l'information." Evidence of authorization from rights holder is required when requesting sound recordings wanted for "fins publiques et commerciales" ("Commande de reproduction d'enregistrements sonores de la Collection nationale de musique," http://www.banq.qc.ca/services/services_reproduction/repro_sonore).

67 PANB, "Image Use Policy."

68 NSA, "Publication and Use of Copies," http://archives.novascotia.ca/share-use-buy-images.

69 PARO, "Copying of Archival Materials: Acceptable Image Use."

70 PARO, "Copying of Archival Materials: Digital Images," http://www.gov.pe.ca/archives/index.php3?number=1005957&lang=E.

71 The Rooms, "Archival Materials Reproduction Order Form," https://www.therooms.ca/sites/default/files/pdf/archival_materials_reproduction_order_form.pdf; "Request for Permission to Publish, Exhibit and Broadcast Archival Materials Form," https://www.therooms.ca/sites/default/files/pdf/request_permission_to_publish.pdf.

72 Only if the repository is the rights holder or if the item is in the public domain.

73 YA, "Terms and Conditions of Use," http://www.tc.gov.yk.ca/reproductionservices.html#terms, "Public Request for Reproduction of Record(s) Agreement," http://www.tc.gov.yk.ca/pdf/Request_for_Reproduction_Form_Amended_May_2009.pdf.

74 NWTA, "Ordering Copies."

Although copyright compliance is the responsibility of the user, some institutions offer limited assistance to those wishing to locate rights holders. AM, AO, NSA, PARO, and NWTA will provide any available information to assist users in identifying and locating rights holders.[75] The Rooms' staff "will check their files to see if the copyright has been assigned to The Rooms Provincial Archives … but cannot do additional research to ascertain the copyright status or to identify or locate the copyright owner."[76] For $20 per request, PAS will do "copyright owner research."[77]

Other repositories (PAA, AO, NSA, The Rooms, BAnQ) state (or imply) that their staff will check the copyright status of the item in question as part of their internal procedures. As indicated in its policy, The Rooms does so in order to determine whether it can grant permission:

> "If the image is in the public domain or if copyright is held by The Rooms Provincial Archives, permission to publish will be granted on a one-time only basis…. If The Rooms Provincial Archives does **not** own the copyright in the image or the copyright holder cannot be identified, … The Rooms Provincial Archives will provide a single copy for research or private study only."[78]

AO staff also attempt to identify the copyright owner: "Archivists will check the copyright status of the record…. If there is insufficient information for an archivist to determine copyright status, the decision and risk to proceed with the use is assumed by the researcher."[79] However, the purpose of this step is not clear, nor is it clear whether the results of the search are conveyed to the user. PAA's order forms contain a column for staff to do a "copyright check,"[80] but it is not clear what this involves or what information (if any) is communicated to the user. NSA "manages publication and use of its archival holdings through a Rights Declaration process," but no details are provided.[81] NSA's copyright policy states that NSA staff are responsible "for identifying archival holdings protected by copyright, and for advising researchers on copyright compliance"

75 AM, "Terms Governing Use of Copies"; AO, "Copyright and Your Research," 3, and "Request for Permission to Publish, Exhibit or Broadcast," http://www.archives.gov.on.ca/en/access/documents/request-to-publish.pdf; NSA "Copyright Policy," s. 10.1; PARO, "Copying of Archival Materials: Acceptable Image Use"; NWTA, "Ordering Copies."

76 The Rooms, "Guide to Copyright and Photographs."

77 PAS, "Copyright," http://www.saskarchives.com/using-archives/visiting-archives/reading-room-services-and-procedures/copyright-and-reproductions, and "Saskatchewan Archives Board Fee Schedule" (2014), http://www.saskarchives.com/sites/default/files/pdf/sab_fee_schedule_2014revision_fnl_10sept2014.pdf.

78 The Rooms, "Guide to Copyright and Photographs" and "Request for Permission to Publish, Exhibit and Broadcast Archival Materials Form."

79 AO, "Copyright and Your Research," 1, 3.

80 PAA, "Audio Visual Reproductions" and "Research Services" order forms.

81 NSA, "Publication and Use of Copies."

(although a later clause states that "staff are not responsible for providing legal advice or legal interpretation to researchers regarding copyright matters").[82] BAnQ's policy is similarly ambiguous; in one place it states that BAnQ will not get involved in ascertaining whether an item is protected or not, but in response to a request for a copy of a sound recording for personal use, staff will check the copyright status to verify that it can be copied.[83] However, regardless of the reasons for having staff attempt to verify the copyright status, the institution's confidence in the results of the search may be misplaced. An earlier study of archivists' knowledge of copyright suggests that their understanding of the topic is not solidly grounded,[84] and users may be given incorrect information.

Requiring the repository's permission is appropriate if the repository is the rights holder. However, requiring the repository's permission while, at the same time, saying that it does not own the copyright and that copyright compliance is the user's responsibility is contradictory and somewhat confusing. It may be that repositories are requiring permission to safeguard interests other than copyright, such as the authenticity and context of the item, revenue generation, or the repository's reputation.[85] But the use of the word "permission" suggests that the repository is a rights holder, which is misleading. Not only does it mask the real reasons for control but, more importantly, such permissions are worthless and may lull users into thinking that if they have the repository's permission, they have obtained the necessary authorizations for further uses.

Alterations to copies and moral rights

As noted, none of these institutions' websites address the matter of waiving moral rights as part of the acquisition process. However, the issue of moral rights arises indirectly when repositories limit the extent to which copies can be altered by users. A key aspect of an archives' mandate is to preserve the authenticity of the records in its holdings, i.e., to ensure that the records are what they purport to be and that they have not been tampered with.[86] To this end, some archives attempt to limit the extent to which users can alter the copies an archives provides.

As discussed, all institutions but PANB place all responsibility for copyright compliance (presumably including moral rights issues) on the end user, but only six institutions address the matter of alteration of images.[87]

82 NSA, "Copyright Policy," ss. 5.5, 10.1.
83 BAnQ, Droit d'auteur et intégrité de l'information – Responsabilités de l'utilisateur," but see "Commande de reproduction d'enregistrements sonores."
84 Jean Dryden, "What Canadian Archivists Know about Copyright and Where They Get Their Knowledge," *Archivaria 69* (Spring 2010): 77–116.
85 Dryden, "Copyfraud or Legitimate Concerns?," 528–30; and Dryden, "Just Let It Go?," 49–52.
86 Pearce-Moses, *Glossary*, 41–42.
87 The remaining institutions (AM, AO, BAnQ, PARO, and LAC) do not address this issue.

PAS explicitly links alteration of documents with moral rights, stating, "In accordance with the *Copyright Act*, which protects a creator's moral rights, reproductions obtained at the Archives must be reproduced accurately and without alteration that compromises their historical or artistic integrity. They may be cropped or resized, but their content must not be altered."[88] PAA simply says that it will not alter PAA images.[89] The Rooms will not alter copies provided to users, but users who do so must state that the copy has been altered.[90] NWTA requires the user to acknowledge "any substantial editing or altering of records."[91] Other institutions prohibit changes without permission. YA's regulations state that making any changes requires the archives' written permission and that the user must indicate that the record has been altered and in what way.[92] NSA states that "items provided for publication and use may not be altered in any way without written permission from the Nova Scotia Archives."[93] BCA states that it does not own the copyright or moral rights in its holdings,[94] but it prohibits "digital manipulation and/or modification of the content of these images [i.e., digital images provided on its website]" while, at the same time, permitting changes to copies of still images and textual documents with the archives' permission.[95] While imposing limitations on the extent to which a user can alter a document probably has more to do with the authenticity and integrity of the record than with moral rights, the repository is overstepping its authority when prohibiting changes to documents without its permission, because only a human author can own the moral rights.

Other conditions

In addition to the conditions already discussed, table 2 sets out a number of other conditions that eight of these repositories place on further uses of copies. The other conditions appear much less frequently, and in some cases apply only to "commercial" uses. Many borrow the language of copyright contracts, i.e., non-exclusive licences, one-time use, and indemnification. BCA has

88 PAS, "Conditions of Service and Use."
89 PAA, "Price List."
90 The Rooms, "Guide to Copyright and Photographs," 3.
91 AO, "Digital Images Order Form," http://www.archives.gov.on.ca/en/about/vdb_order.aspx, s. 4; The Rooms, "Guide to Copyright and Photographs," 3; and NWTA, "Ordering Copies" and "Copyright and Usage Notice."
92 Yukon Territory, *Reproductions (Fees and Conditions of Use) Regulation*, OIC 2014/06, s. 10(2)(b) (Archives Act).
93 NSA, "Publication and Use of Copies."
94 BCA, "Permissions Form for Sound Recordings and Moving Image Material," and "Permissions Form for Still Images, Records and Documents."
95 BCA, "Archives Policies: Usage," http://royalbcmuseum.bc.ca/archives-visitors/policies, and "Permissions Form for Still Images, Records and Documents."

Table 2: Other terms and conditions on uses of copies from archival holdings

Archives	One-time use	Non-exclusive licence	Duration of licence	Indemnity	Low resolution on website	No inappropriate uses
BCA[96]	Yes	Yes	Publication, 5 years; broadcast, 10 years	User will hold BCA harmless for claims resulting from users' actions	72 dpi (still images, records and documents)	Yes
PAS[97]	Yes	Yes**		User will indemnify PAS for claims resulting from users' actions	96 dpi	
AO[98]	Yes					
NSA[99]	Yes	Yes	5 years **	NSA will not indemnify user for claims resulting from users' actions**	72 dpi	
PARO[100]					72 dpi	
The Rooms[101]	Yes					
YA[102]	Yes	Yes**		User will indemnify YA for claims resulting from users' actions		Yes**
NWTA[103]					72 dpi	

**Applies to commercial uses only

96 BCA, "Permissions Form for Sound Recordings and Moving Image Material" and "Permissions Form for Still Images, Records and Documents."
97 PAS, "Conditions of Service and Use."
98 AO, "Request for Permission to Publish, Exhibit or Broadcast."
99 NSA, "Publication and Use of Copies."
100 PARO, "Copying of Archival Materials: Acceptable Image Use."
101 The Rooms, "Guide to Copyright and Photographs" and "Request for Permission."
102 YA, "Commercial Use Policy."
103 NWTA, "Copyright and Usage Notice."

the most comprehensive list of terms and conditions. BCA and YA prohibit inappropriate uses, defined in BCA's case as "use … in any manner that could adversely affect the reputation of [the repository]," and in YA's case as uses that offend First Nations or the privacy interests of those living in a small community. Five institutions stipulate that only low-resolution images can be displayed on websites, presumably to ensure that publication-quality images cannot be copied from the user's website.

Exceeding the Scope of Copyright

Requiring the permission of the repository for further uses, when the repository may not own the copyright, is highly problematic. The situation is exacerbated when some repositories require permission for activities that fall outside the exclusive rights of the rights holder. For example, the right to exhibit a work publicly applies only to artistic works (excluding maps and plans) created before 7 June 1988;[104] publicly exhibiting textual records of any age or older photos is not one of the rights of the copyright owner. However, BCA, PAA, AO, NSA, and The Rooms all include exhibits among the uses that require permission.[105]

Copyright does not last forever. Once the term of copyright expires, the work is in the public domain and can be freely used by anyone. Archives have been subject to criticism for attempting to control the uses of public domain material. Jason Mazzone coined the term "copyfraud" to refer to falsely claiming a copyright in a public domain work,[106] and he specifically mentions archival institutions as perpetrators of copyfraud.[107] However, only six archives in this study (YA, The Rooms, NSA, PAS, AO, and BAnQ) explicitly address the matter of public domain works. As table 1 indicates, five of these are institutions that require the repository's permission for non-research uses, but not all distinguish between protected material and public domain holdings. YA does not restrict the use of works in the public domain (or works in which it owns the copyright, which it also considers to be in the public domain).[108]

104 *Copyright Act*, s. 3(1)(g).

105 BCA, "Permissions Form for Sound Recordings and Moving Image Material" and "Permissions Form for Still Images, Records and Documents"; PAA, "Operations Manual," 41; AO, "Copyright and Your Research," 2; NSA, "Publication and Use of Copies"; The Rooms, "Archival Materials Reproduction Order Form."

106 Jason Mazzone, "Copyfraud," *New York University Law Review* 81 (2006): 1028.

107 Ibid., 1052–58.

108 Its policy states, "Yukon Archives adopts the position that works for which copyright has expired and/or over which it holds copyright are in the public domain. This means that Yukon Archives is the trusted and expert stewards [*sic*] of these materials on behalf of the public, rather than their owner per se [and] ... Yukon Archives favours a liberal position for making these records available to members of the public for non-commercial and commercial uses" ("Commercial Use Policy," 1).

Similarly, The Rooms does not distinguish between holdings in which it owns the copyright and holdings in the public domain, although it takes the opposite view in that it grants permission for both ("if the image is in the public domain or if copyright is held by The Rooms Provincial Archives, permission to publish will be granted on a one-time only basis, for the use stated [on the order form]").[109] NSA suggests that its conditions on uses beyond research or private study apply only to material "not yet in the public domain."[110] BAnQ alludes to the possibility that copyright expires, but simply states that it will not conduct research to ascertain the death date of the author nor venture an opinion as to whether copyright still exists.[111] However, BAnQ has a separate policy for providing reproductions of sound recordings and will provide a copy of a sound recording in which the copyright has expired, stating, "Vous devez obligatoirement obtenir l'autorisation de l'ensemble des ayants-droit de l'enregistrement avant que BAnQ ne puisse procéder à sa reproduction, sauf si l'enregistrement est dans le domaine public."[112] While AO does not explicitly address public domain materials, its policy is ambiguous. Although its policy states that users must submit a "Request for Permission to Publish, Exhibit or Broadcast" form "for use beyond research and private study of any copy, *regardless of copyright status* [emphasis added], acquired from the Archives," it goes on to include "publishing, exhibiting, or broadcasting published material whose author died more than 50 years ago" in its examples of uses that do not require the repository's permission.[113] PAS, which does not require the repository's permission for non-research uses, acknowledges that permission for uses beyond research and private study are not required for reproductions of documents in the public domain.[114] BCA, on the other hand, does not acknowledge that copyright expires. For an extra fee ($500 per work), BCA will license rights in perpetuity for certain commercial uses.[115]

Conclusion

One might expect that a study of the copyright policies and practices of just 13 institutions with a similar mandate would be fairly consistent. However, the study reveals a wide range of practices across institutions and, in some cases, internal inconsistencies or ambiguity within a single repository's practices.

109 The Rooms, Request for Permission to Publish, Exhibit and Broadcast Archival Materials Form, 2.
110 NSA, "Copying and Use Protocols."
111 BAnQ, "Droit d'auteur et intégrité de l'information."
112 BAnQ, "Commande de reproduction d'enregistrements sonores."
113 AO, "Copyright and Your Research," 2.
114 PAS, "Conditions of Service and Use" and "Copyright."
115 BCA, "Licensing Fee Schedule," http://royalbcmuseum.bc.ca/assets/Licensing-Fee-Schedule1.pdf.

While the findings of this study pertain to Canadian government archives, it is entirely possible that a similar study of university archives or church archives or municipal archives would reveal similar results. Other types of institutions could benefit equally from the following conclusions.

From a legal perspective, some of these institutions' practices are problematic. Most problematic is the practice of requiring a repository's permission for uses beyond research and private study when, as the discussion of ownership makes clear, it is not at all certain that the repository owns the copyright. Related to this is the requirement by some institutions for permission for uses outside the exclusive rights of the copyright holder or for works in the public domain. Whether their fees represent a motive of gain depends on whether copies are being made under s. 30.21 or fair dealing and how their fees were determined, particularly if staff costs can be included in calculating "overhead."

But do these practices pose a great legal risk? Authorizing uses without having the right to do so is a problem only if a legitimate rights holder challenges the archives (as well as the user) upon finding that his or her work has been disseminated in some objectionable way on the authorization of the archives. While there is only a small body of American jurisprudence involving the publication of archival materials in print formats,[116] the plaintiffs have sued the users (or their publishers), not the archives holding the materials in question. Although Canadian archives may have faced complaints, they have been resolved informally. None has gone as far as litigation.

Canadian government archives may have other legitimate reasons for wanting to control how their holdings are used. Their concerns about altering copies of documents, their reasons for wanting the archives acknowledged as the source, and their interest in revenue generation have been discussed. While some of their practices may exceed the scope of copyright law, such practices may be motivated by interests other than copyright. Unfortunately, these institutions do not appear to distinguish clearly between copyright law and other interests. Any review of policies and practices in this regard would benefit from some reflection on this matter.

In any case, their policies and practices for making copies for users need review. From a public service/operational perspective, many policies are ambiguous or inconsistent and some are out of date, with the result that users (and possibly staff) may be confused or acting on incorrect information. Policies, procedures, and forms need to be revised to ensure that they are comprehensive, internally consistent, and compliant with the current statutory

116 *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987); *Love v. Kwitny*, 706 F. Supp. 1123 (S.D.N.Y. 1989). *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991); *Norse v. Henry Holt & Co.*, 847 F. Supp. 142 (N.D. Cal. 1994); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194 (4th Cir. 1998).

provisions that allow archives to make copies of their holdings for users. It would be desirable to consolidate all the information in a single place, but if that is not possible, it would be helpful if the information in policy documents, order forms, and price lists were logically linked and internally consistent. While few institutions indicate the statutory basis for their policies, it appears that they are relying on the exceptions for LAMs rather than fair dealing. They need to understand that fair dealing is another option that can work along with the LAMs exceptions to give them greater flexibility and scope for their copying practices. It is noteworthy that the Royal Society of Canada's report on the future of Canada's libraries and archives recommended "that libraries and archivists make full use of their users' rights of fair dealing."[117]

These institutions would be on firmer legal ground if they granted permission only when it is clear that their repository owns copyright. In all other cases, they would neither grant nor deny permission; instead, they would place all responsibility for copyright compliance on the user.[118] There would be no need for "permission" forms; an order form would be sufficient to gather the information needed to review the proposed use, ensure proper attribution, generate revenue, and track use of the archives' holdings. To achieve these ends, it would be appropriate to accompany the copies with a letter/contract requiring the user to comply with certain terms and conditions that address archival interests unrelated to copyright (e.g., acknowledge the archives as the source, refrain from altering the documents to maintain their authenticity, etc.). However, the letter/contract should avoid the language of "permissions" or copyright, unless the archives is the rights holder. The result would be legally sound and clearer for staff and users alike.

More significantly, users would be presented with more consistent practices, and inappropriate restrictions minimized. The proposed practices would be more consistent with the archival mission to make holdings available to the greatest degree possible.

117 Patricia Demers et al., *The Future Now: Canada's Libraries, Archives, and Public Memory* (Ottawa, ON: Royal Society of Canada, 2014), 181.

118 Several American archives (those of Columbia University, Cornell University, and the Beinecke Rare Book & Manuscript Library at Yale University) have recently adopted such a policy: Columbia University Libraries, "Publication & Digital Reproduction Policy & Procedures," http://library.columbia.edu/services/preservation/publications_policy.html; Cornell University Library, "Guidelines for Using Public Domain Text, Images, Audio, and Video Reproduced from Cornell University Library Collections," http://cdl.library.cornell.edu/guidelines.html; and Beinecke Rare Book and Manuscript Library, "Permissions and Copyright," http://beinecke.library.yale.edu/research/permissions-copyright.

Jean Dryden *is an information professional with qualifications in records management, archives, and librarianship, She has over 35 years of experience as a staff archivist and archival administrator at the National Archives of Canada and the Provincial Archives of Alberta, and as chief archivist of the United Church of Canada/Victoria University Archives. Her doctoral dissertation investigated the copyright practices of Canadian archival repositories in making their holdings available online. While on the faculty at the University of Maryland, she completed a grant-funded comparative study of the practices of American repositories. In 2015, she completed a Master of Laws degree, specializing in intellectual property, at Osgoode Hall Law School at York University, Toronto. She has been active throughout her career on committees and boards of professional associations. As chair of the Bureau of Canadian Archivists Copyright Committee, she played a lead role in successfully lobbying for amendments to the* Copyright Act *that benefited libraries, archives, and museums. In addition to being the author of numerous publications and presentations on copyright issues, she is the author of* Demystifying Copyright: A Researcher's Guide to Copyright in Canadian Libraries and Archives, 2nd ed. *(Ottawa, ON: Canadian Library Association, 2014) and is a past general editor of* Archivaria.

Appendix: National, Provincial, and Territorial Archives and Their Abbreviations (Alphabetical by Jurisdiction)

Jurisdiction	Name of Archives	Abbreviation
Alberta	Provincial Archives of Alberta	PAA
British Columbia	British Columbia Archives	BCA
Canada	Library and Archives Canada	LAC
Manitoba	Archives of Manitoba	AM
New Brunswick	Provincial Archives of New Brunswick	PANB
Newfoundland and Labrador	The Rooms, Provincial Archives Division	The Rooms
Northwest Territories	Northwest Territories Archives	NWTA
Nova Scotia	Nova Scotia Archives	NSA
Ontario	Archives of Ontario	AO
Prince Edward Island	Public Archives and Record Office	PARO
Quebec	Bibliothèque et Archives nationales du Québec	BAnQ
Saskatchewan	Provincial Archives of Saskatchewan	PAS
Yukon	Yukon Archives	YA